LIBRARY
SUPREME COURT, U.S.
WASHINGTON, D.C. 20543

Supreme Court, U.S.
FILED
JUN 5 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-1799

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

TREADWELL FORD, INC.,
Appellant,

v.

CLARENCE W. CAMPBELL, *et al.*,
Appellees.

On Appeal from the Supreme Court of Alabama

MOTION TO DISMISS

Of Counsel:

RICHARD BOUNDS
JAMES A. YANCE

CUNNINGHAM, BOUNDS,
YANCE, CROWDER & BROWN
1601 Dauphin Street
Mobile, Alabama 36660
Telephone: (205) 471-6191

NEIL L. HANLEY

WHIDDON, HANLEY &
MARIETTA
557 Church Street
Mobile, Alabama 36602
Telephone: (205) 438-6900

ALVIN T. PRESTWOOD *
JOSEPH P. BORG

CAPOUANO, WAMPOLD,
PRESTWOOD & SANSONE, P.A.
350 Adams Avenue
Montgomery, Alabama 36104
Telephone: (205) 264-6401
Attorneys for Appellees

* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTION PRESENTED

Whether federal claims which were not presented to the Supreme Court of Alabama until an application for rehearing, which were not presented in accordance with established state practice, and which were not passed upon by that court, are within this Court's jurisdiction.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iv
MOTION TO DISMISS	1
STATEMENT OF THE CASE	1
ARGUMENT:	
I. THE FEDERAL ISSUES WERE NEITHER PROPERLY PRESENTED TO NOR CONSIDERED BY THE SUPREME COURT OF ALABAMA	3
A. The Constitutionality of § 12-22-72 Was Not Timely and Properly Raised	5
B. The Federal Constitutional Challenge to the Excessiveness of the Punitive Damages Award Was Not Timely or Properly Raised	9
CONCLUSION	18
APPENDIX	

TABLE OF AUTHORITIES

CASES: Page

Aetna Life Insurance Co. v. Lavoie, Slip op. at 14 (No. 84-1601, April 22, 1986) 14, 16, 18
Air Movers of America, Inc. v. State National Bank, 293 Ala. 312, 302 So.2d 517 (1974) 7
Alabama Farm Bureau Mutual Casualty Insurance Co. v. Anderson, 48 Ala. App. 172, 263 So.2d 149 (1972), *cert. denied*, 288 Ala. 538, 263 So.2d 155 (1972) 3
Atlanta, Birmingham & Coast R. Co. v. Cary, 250 Ala. 675, 35 So.2d 559 (1948) 6, 7
Bienville Mortgage Corporation v. Mayo, 286 Ala. 675, 245 So.2d 819 (1971) 12
Blair v. York Engineering Co., Inc., 380 So.2d 878 (Ala. Civ. App. 1980) 16
Bonded Builders Supply Co. v. Lons, 288 Ala. 669, 264 So.2d 518 (1972) 16
Brinkerhoff-Faris Trust & Savings Co. v. Hill, 281 U.S. 673 (1930) 15
Brown Mechanical Contractors, Inc. v. Centennial Ins. Co., 431 So.2d 932 (Ala. 1983) 5
Carter v. Carter, 247 Ala. 409, 24 So.2d 759 (1945) 6
Central of Georgia Railway Co. v. Steed, 287 Ala. 64, 248 So.2d 110 (1971) 5, 6, 7, 9
Chapman v. Rivers Const. Co., 284 Ala. 633, 227 So.2d 403 (1969) 5
Childress v. Younger, 2[illegible] Ala. 219, 61 So.2d 808 (1952) 5, 8
CIO v. McAdory, 325 U.S. 472 (1945) 15
City of Birmingham v. Bowen, 254 Ala. 41, 47 So.2d 174 (1950) 6, 7
City of Troy v. McLendon, 279 Ala. 553, 188 So.2d 281 (1966) 5
Consolidated Coal Co. v. State, 236 Ala. 489, 183 So. 650 (1938) 11
Cooper v. State, 226 Ala. 288, 147 So. 432 (1933) 4
Copeland v. Pope, 198 Ala. 257, 73 So. 490 (1916) .. 12, 14
Crowell v. Randell, 35 U.S. (10 Pet.) 368 (1836) 5

TABLE OF AUTHORITIES—Continued

	Page
DeGraff v. State, 34 Ala. App. 137, 37 So.2d 130 (1948)	16
Dent v. Foy, 210 Ala. 160, 97 So. 627 (1923)	6
Dewey v. Des Moines, 173 U.S. 193 (1899)	15
Dodson v. Beaird, 237 Ala. 587, 187 So.2d 862 (1939)	12
Dunn v. Dean, 196 Ala. 486, 71 So. 709 (1916)	9, 11, 14
Ex parte Hanna, 267 Ala. 527, 103 So.2d 720 (1958)	10, 11
Exxon Corp. v. Eagerton, 462 U.S. 176 (1983)	4, 5, 15
Federal Land Bank of New Orleans v. Williams, 237 Ala. 318, 186 So. 689 (1939)	12
First Alabama Bank of Montgomery, N.A. v. Martin, 425 So.2d 415 (Ala. 1983)	5
Fullerton v. Texas, 196 U.S. 192 (1905)	5
Gibbons v. Gibbons, 205 Ala. 636, 88 So. 833 (1921)	13
Goodgame v. Dawson, 242 Ala. 499, 7 So.2d 77 (1942)	12
Goodyear Tire & Rubber Co. v. Downey, 266 Ala. 344, 96 So.2d 278 (1957)	5, 6
Green v. First National Bank of Tuscaloosa, 49 Ala. App. 426, 272 So.2d 895 (1971), *rev'd on other grounds*, 290 Ala. 14, 272 So.2d 901 (1972)	3
Hathorn v. Lovorn, 457 U.S. 255 (1982)	5, 17
Howell v. Roueche, 263 Ala. 83, 81 So.2d 297 (1955)	13, 14
Huie v. Smith, 236 Ala. 516, 183 So. 661 (1938)	11
Illinois v. Gates, 462 U.S. 213 (1983)	15
Johnson v. Hodge, 291 Ala. 142, 279 So.2d 123 (1973)	16
King v. Reid, 428 So.2d 611 (Ala. 1983)	10
Kirkland v. Kirkland, 281 Ala. 42, 198 So.2d 771 (1967)	3, 10
Lawrence v. Jones, 37 Ala. 388 (1861)	6
Lindsey v. Normet, 405 U.S. 56 (1972)	16
Lloyd v. Stewart, 258 Ala. 627, 64 So.2d 884 (1953)	5

TABLE OF AUTHORITIES—Continued

	Page
Louisville & Nashville R.R. Co. v. Stewart, 241 U.S. 261 (1916)	7
Louisville & Nashville R.R. Co. v. Western Union Telegraph Co., 195 Ala. 124, 71 So. 118 (1916)	12
Lovett v. Uptain, 450 So.2d 113 (Ala. Civ. App. 1983), *aff'd sub nom. Ex parte Lovett*, 450 So.2d 116 (Ala. 1984)	3, 10
Martin Bldg. Co. v. Imperial Laundry Co., 220 Ala. 90, 124 So. 82 (1929)	12
Mitchell v. State, 450 So.2d 140 (Ala. Civ. App. 1984)	16
Montgomery Light & Water Power Co. v. Thombs, 204 Ala. 678, 87 So. 205 (1920)	6
Morgan v. Cherokee County Bd. of Ed., 257 Ala. 201, 58 So.2d 134 (1952)	16
New York Life Ins. Co. v. Reese, 201 Ala. 673, 79 So. 245 (1918)	6
Orr v. Orr, 440 U.S. 268 (1979)	4
Patterson v. Gaines, 264 Ala. 184, 85 So.2d 893 (1956)	5
Putnam v. City of Huntsville, 48 Ala. App. 33, 261 So.2d 754 (1972)	4
Radio Station WOW, Inc. v. Johnson, 326 U.S. 120 (1945)	3
Robinson v. Allison, 97 Ala. 596, 12 So. 382 (1893)	3
Rudolph v. Rudolph, 251 Ala. 317, 36 So.2d 902 (1948)	12
Schwabacher v. Herring, 35 Ala. App. 496, 48 So.2d 574 (1950)	16
Security Transactions, Inc. v. Nelson Excavating & Paving Co., Inc., 55 Ala. App. 223, 314 So.2d 297, *cert. den.*, 284 Ala. 768, 314 So.2d 304 (1975)	16
Sisson v. Swift, 243 Ala. 289, 9 So.2d 891 (1942)	13, 14
Snellings v. Builders' Supply Co., 229 Ala. 1, 155 So. 858 (1934)	6
State v. City of Birmingham, 160 Ala. 196, 48 So. 843 (1909)	4
Webb v. Webb, 451 U.S. 493 (1981)	17

TABLE OF AUTHORITIES—Continued

Page

Winn-Dixie Montgomery, Inc. v. Rowell, 52 Ala. App. 1, 288 So.2d 785, *cert. den.*, 292 Ala. 758, 288 So.2d 792 (1973) 16

CONSTITUTIONAL PROVISIONS:

U.S. Constitution, Amend. VIII ..... *passim*
U.S. Constitution, Amend. XIV ..... *passim*

FEDERAL STATUTES:

Judiciary Act of 1789, Section 25 4
28 U.S.C. Section 1257 4

ALABAMA STATUTES AND RULES:

Ala. Code § 12-22-72 (1975) ..... *passim*, 1a
Ala. Rule App. P. 40 ..... 2a

MISCELLANEOUS:

16 C. Wright, A. Miller, E. Cooper and E. Gressman, Federal Practice and Procedure (1977) 3

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

No. 85-1799

TREADWELL FORD, INC.,
Appellant,

v.

CLARENCE W. CAMPBELL, *et al.*,
Appellees.

On Appeal from the Supreme Court of Alabama

MOTION TO DISMISS

Pursuant to Rule 16.1(b) of the Rules of the Supreme Court of the United States, appellees move to dismiss this appeal on the grounds that the federal questions sought to be reviewed were not timely and properly raised before the Supreme Court of Alabama and were not passed upon by that court.

STATEMENT OF THE CASE

On January 10, 1986, the Supreme Court of Alabama affirmed judgments entered in the Circuit Court of Mobile County, Alabama against the appellant Treadwell Ford, Inc. (hereinafter sometimes referred to as "Treadwell"), in favor of the appellees. The trial court had awarded Clarence W. Campbell $350,000 upon his claim for compensatory and punitive damages; Jacqueline Evans $60,000 compensatory damages; and the executors of

Sallie C. Hamilton $1,000,000 as punitive damages in a wrongful death action.

The federal constitutional challenges sought to be raised in this Court were not presented to the trial court, nor were they presented to the Supreme Court of Alabama until the appellant filed its application for rehearing in that court.

Without citing any constitutional law cases in support of its argument, Treadwell for the first time upon rehearing maintained that the punitive damages awards were violative of the Excessive Fines Clause of the Eighth Amendment and also of the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States. (Jurisdictional Statement 26a-29a). Prior to that time, the appellant had asserted, upon a post-judgment motion in the trial court that, "[t]he verdict of the jury was excessive" (Jurisdictional Statement 36a), and had argued that ground generally in its initial brief on appeal without alluding to any constitutional grounds. (Jurisdictional Statement 42a-45a).

Also for the first time on application for rehearing, the appellant asserted that § 12-22-72, Code of Alabama (1975), violated the Equal Protection Clause of the Fourteenth Amendment. That code section provides for a ten percent (10%) penalty to be assessed against a defendant who suffers an affirmance on appeal of a money judgment against him.

Without addressing either of these federal constitutional claims, the Alabama Supreme Court overruled the appellant Treadwell's application for rehearing on March 7, 1986.

ARGUMENT

I. THE FEDERAL ISSUES WERE NEITHER PROPERLY PRESENTED TO NOR CONSIDERED BY THE SUPREME COURT OF ALABAMA.

This Court has laid down the general rule that "[q]uestions first presented to the highest State court on a petition for rehearing come too late for consideration" here. *Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120, 128 (1945); 16 C. Wright, A. Miller, E. Cooper & E. Gressman, Federal Practice and Procedure, § 4022 at 701 (1977).

The Alabama appellate courts are firmly committed to the rule that new questions may not be presented to them for the first time on rehearing. In *Kirkland v. Kirkland*, 281 Ala. 42, 198 So.2d 771, 777 (1967), the Supreme Court of Alabama held:

> "We cannot sanction the practice of bringing up new questions for the first time in application for rehearing. Robinson v. Allison, 97 Ala. 596, 604, 12 So. 382, 604 [sic].
>
> "An application for rehearing on ground not argued or suggested until after our judgment was rendered cannot now be considered."

In *Lovett v. Uptain*, 450 So.2d 113, 116 (Ala. Civ. App. 1983), *aff'd sub nom. Ex parte Lovett*, 450 So.2d 116, 118 (Ala. 1984), the court stated:

> "After an opinion has been rendered by an appellate court, consideration may not be given on rehearing to issues which were not argued nor suggested upon the initial submission of the case."

See Green v. First National Bank of Tuscaloosa, 49 Ala. App. 426, 272 So.2d 895, 901 (1971), *rev'd on other grounds*, 290 Ala. 14, 272 So.2d 901 (1972); *Alabama Farm Bureau Mutual Casualty Insurance Co. v. Anderson*, 48 Ala. App. 172, 263 So.2d 149 (1972), *cert. de-*

nied, 288 Ala. 538, 263 So.2d 155 (1972); *Putnam v. City of Huntsville*, 48 Ala. App. 33, 261 So.2d 754 (1972). This rule is but an extension of the general Alabama rule against raising new issues for the first time on appeal. In *Exxon Corp. v. Eagerton*, 462 U.S. 176, 181, n. 3 (1983), this Court noted that "[t]he general practice of the Alabama appellate courts is not to consider issues raised for the first time on appeal." [1]

The Supreme Court of Alabama has specifically refused to hear arguments upon new *constitutional* issues raised for the first time on rehearing. *See Cooper v. State*, 226 Ala. 288, 147 So. 432 (1933); *State v. City of Birmingham*, 160 Ala. 196, 48 So. 843 (1909).[2]

In construing Section 25 of the Judiciary Act of 1789, the predecessor of 28 U.S.C. § 1257, Justice Story wrote: "it has been uniformly held that to give this court jurisdiction, two things should have occurred and be apparent in the record: First, that some one of the questions stated in the section did arise in the court below; and second, that a decision was actually made thereon by the

---

[1] In *Orr v. Orr*, 440 U.S. 268 (1979), a constitutional claim was first presented on appeal, but was considered by the Supreme Court of Alabama without objection. At 440 U.S. 274, this Court noted:

> "This unexcused tardiness might well have constituted a procedural default under state law, and if Alabama had refused to hear [the] constitutional objection on that ground, we might have been without jurisdiction to consider it here."

This Court emphasized that its conclusion did not "preclude any other state, or even Alabama in another case," from concluding that the constitutional argument made in *Orr*, raised in the same manner, would be too late to be considered. *Id.* at 275, n.4.

[2] At page 8 of its jurisdictional statement, the appellant argues that there is some significance to the fact that the Alabama Supreme Court in this case *overruled* its application for rehearing, instead of *denying* the application. Overruling applications for rehearing upon grounds that a constitutional issue was first raised on rehearing is not inconsistent with Alabama's practice. *See e.g.*, Cooper v. State, 226 Ala. 288, 147 So. 432 (1933).

same court . . . ." *Crowell v. Randell*, 35 U.S. (10 Pet.) 368, 390 (1836). Where the highest state court does not address a federal question, this Court assumes that the omission was caused by the lack of proper presentation. *Exxon Corp. v. Eagerton*, *supra*, 462 U.S. at 181, n. 3. And even if a state court passes on some questions raised on rehearing, federal questions also then raised but not passed upon may not be presented in this Court. *Fullerton v. Texas*, 196 U.S. 192 (1905).

Citing *Hathorn v. Lovorn*, 457 U.S. 255 (1982), the appellant contends that Alabama's practice of not considering new issues raised for the first time upon application for rehearing is not "strictly or regularly" followed, and hence presents "no independent and adequate state grounds barring [this Court's] review of the federal issue." 457 U.S. at 264-65. The Alabama court's actual practice will be hereinafter explored separately as to the two issues raised in this case.

A. The Constitutionality of § 12-22-72 Was Not Timely and Properly Raised.

Treadwell asserts, at pages 7 and 8 of its Jurisdictional Statement, that the Supreme Court of Alabama, in a line of at least seventeen cases, has dealt with the federal constitutionality of Alabama's affirmance fee statute, or questions regarding the proper construction of that statute, when presented for the first time at the rehearing stage.[3] One of the seventeen cases cited by the

[3] The cases relied upon by the appellant for this proposition are: Brown Mech. Contractors, Inc. v. Centennial Ins. Co., 431 So.2d 932 (Ala. 1983); First Alabama Bank of Montgomery, N.A. v. Martin, 425 So.2d 415 (Ala. 1983); Central of Georgia Railway Co. v. Steed, 287 Ala. 64, 248 So.2d 110 (1971); Chapman v. Rivers Const. Co., 284 Ala. 633, 227 So.2d 403 (1969); City of Troy v. McLendon, 279 Ala. 553, 188 So.2d 281 (1966); Goodyear Tire & Rubber Co. v. Downey, 266 Ala. 344, 96 So.2d 278 (1957); Paterson v. Gaines, 264 Ala. 184, 85 So.2d 893 (1956); Lloyd v. Stewart, 258 Ala. 627, 64 So.2d 884 (1953); Childress v. Younger, 258 Ala. 219, 61 So.2d 808

appellant did not involve a rehearing at all, but involved a second appeal asserting that the original judgment had been misinterpreted on remand, and that case thus is of no assistance in assessing the Alabama court's practice on rehearing. *See Lawrence v. Jones*, 37 Ala. 388 (1861).

In each of the remaining sixteen cases relied upon by the appellant, the parties were arguably uncertain as to whether the affirmed judgments fell within the specific language of § 12-22-72. In eleven of the cases, the successful appellees (plaintiffs below) filed post-affirmance motions or applications asserting that the appellate court should have, but did not, award the 10% affirmance fee. Thus, there are only five cases in which the unsuccessful appellants (defendants below) mounted any challenge, constitutional or otherwise, to the statute. In these cases, the Alabama court held that the 10% affirmance fee had been properly applied when the judgment was affirmed for a specific amount of money and had been superseded by bond on appeal,[4] where a judgment below had been entered under the Federal Employers' Liability Act,[5] or under the Workmen's Compensation Act upon review by certiorari instead of by appeal,[6] and where a municipal

---

(1952); City of Birmingham v. Bowen, 254 Ala. 41, 47 So.2d 174 (1950); Atlanta, Birmingham & Coast R. Co. v. Cary, 250 Ala. 675, 35 So.2d 559 (1948); Carter v. Carter, 247 Ala. 409, 24 So.2d 759 (1945); Snellings v. Builders' Supply Co., 229 Ala. 1, 155 So. 858 (1934); Dent v. Foy, 210 Ala. 160, 97 So. 627 (1923); Montgomery Light & Water Power Co. v. Thombs, 204 Ala. 678, 87 So. 205 (1920); New York Life Ins. Co. v. Reese, 201 Ala. 673, 79 So. 245 (1918); Lawrence v. Jones, 37 Ala. 388 (1861).

[4] *See* Snellings v. Builders' Supply Co., 229 Ala. 1, 155 So. 858 (1934).

[5] *See* Central of Georgia Railway Company v. Steed, 287 Ala. 64, 248 So.2d 110 (1971); Atlanta, Birmingham and Coast R. Co. v. Cary, 250 Ala. 675, 35 So.2d 559 (1948).

[6] *See* Goodyear Tire & Rubber Co. of Ala. v. Downey, 266 Ala. 344, 96 So.2d 278 (1957).

defendant had filed a supersedeas bond even though not required to do so.[7]

The instant case differs from those cited by the appellant in one significant respect. Here, the appellant was aware that the judgments secured against it, if left undisturbed upon affirmance, would surely lead to the application of the penalty provided by § 12-22-72. In fact, Treadwell has not heretofore, and apparently does not now, maintain that the affirmance fee statute, if constitutional, should not apply in this case. It thus had ample opportunity to raise its question concerning the statute upon its initial appeal,[8] but presumably elected not to do so.

The appellant's claim that it could present its federal constitutional challenge to § 12-22-72 for the first time on rehearing rests substantially upon the case of *Central of Georgia Railway Company v. Steed*, 287 Ala. 64, 248 So.2d 110 (1971). In that case, the appellant did indeed assert that the forerunner to § 12-22-72 was violative of the Equal Protection Clause of the Fourteenth Amendment. However, nothing in the *Steed* opinion indicates that the Alabama Supreme Court reached that or any other constitutional issue first raised upon rehearing. Rather, the court overruled the application for rehearing upon the authority of *Atlanta, Birmingham & Coast R. Co. v. Cary*, 250 Ala. 675, 35 So.2d 559 (1948), where it had held that the affirmance fee statute applied to judgments in actions in state court brought under the FELA. In *Cary*, the court had simply noted that this Court had held in *Louisville & Nashville R.R. Co. v. Stewart*, 241 U.S. 261 (1916), that it was not improper for a state to add a 10% penalty to a FELA judgment secured in

---

[7] *See* City of Birmingham v. Bowen, 254 Ala. 41, 47 So.2d 174 (1950).

[8] *See, e.g.*, Air Movers of America, Inc. v. State National Bank, 293 Ala. 312, 302 So.2d 517 (1974).

state court upon the affirmance of said judgment on appeal.

It is submitted that there is no indication in any of the cited cases that the Supreme Court of Alabama ever addressed a federal constitutional challenge to § 12-22-72 when that issue was raised for the first time upon a post-affirmance motion or application.

The award of the 10% affirmance fee under Alabama's statute is a "ministerial duty" in cases where the trial court's judgment is for money only and is affirmed without alteration or modification. *Childress v. Younger*, 258 Ala. 219, 221, 61 So.2d 808 (1952). The parties, in cases admitting of doubt as to its applicability to their particular judgments, may go through the initial submission stages of an appeal without realizing that there may be disagreement as to whether the affirmance fee statute will be applicable upon affirmance. For this reason, it is logical that the appellate courts in Alabama address those disagreements after such affirmance. When the penalty is added, a surprised appellant may challenge its applicability, and if it is not added, a surprised appellee may insist that the affirmance fee should have been included.

The addressing of this "new issue" upon rehearing in those cases of doubt is thus logical, and may be regarded as an exception to, or as not even being included in, the general rule that the Alabama courts will not address issues raised for the first time upon rehearing. This logic fails, however, where the appellant knows for certain that the judgment is of a class which will definitely be subject to the penalty upon an affirmance.

When a defendant subjected to a large money judgment as in this case elects to take an appeal, he automatically recognizes the certainty of a substantial penalty if the judgment is affirmed. Strategically, he faces the

dilemma of whether to raise a constitutional challenge to the statute upon original submission and thereby exhibit some doubt as to the merits of his appeal, or to exude confidence that the case will be reversed and opt not to challenge the statute at that stage. Under Alabama practice, he is free to choose either route. If, however, he elects not to challenge the statute upon original submission, he faces the Alabama rule that new issues will not be first addressed upon rehearing.

As has been heretofore shown, the case of *Central of Georgia Railway Company v. Steed*, 287 Ala. 64, 248 So.2d 110 (1971), offers no solace to the position of the appellant, because the Alabama Supreme Court did not there address the federal constitutional issue raised on rehearing, although it stated that the appellee made such a claim upon rehearing.

As will be hereinafter shown, the appellant cites only one case (*Dunn v. Dean*, 196 Ala. 486, 71 So. 709 [1916]) where the Alabama Supreme Court directly addressed a constitutional issue clearly not alluded to upon original submission. That issue involved a state constitutional question as to whether the statute under consideration was validly enacted so as to give it life. In view of its long subsequent history of refusing to address any new issues for the first time upon rehearing, it is submitted that the *Dunn* case cannot be construed as a breach in the Alabama Supreme Court's present normal practice of "strictly and regularly" following its exclusionary rule.

B. The Federal Constitutional Challenge to the Excessiveness of the Punitive Damages Award Was Not Timely or Properly Raised.

In its claim that the issue of punitive damages awards was properly raised in the state courts, the appellant asserts at pages 11-12 of the Jurisdictional Statement that the practice of the Alabama Supreme Court is to

consider constitutional issues raised for the first time on rehearing. It there cites four cases for the proposition that, even when the Alabama court suggests that it will not pass upon new questions on rehearing, "it frequently will proceed to pass on such questions." One case relied upon is *Lovett v. Uptain*, 450 So.2d 113 (Ala. Civ. App. 1983), *aff'd sub nom. Ex parte Lovett*, 450 So.2d 116 (Ala. 1984), in which the Alabama Court of Civil Appeals refused to consider an issue raised for the first time upon rehearing, observing that "[a]fter an opinion has been rendered by an appellate court, consideration may not be given on rehearing to issues which were not argued nor suggested upon the initial submission of the case." 450 So.2d at 116. On certiorari, the Alabama Supreme Court observed that the party making the new contention had submitted no evidence to support it in the trial court.

In *King v. Reid*, 428 So.2d 611 (Ala. 1983), a constitutional challenge to statutes was raised on appeal which had not been raised in the trial court. The Alabama Supreme Court noted that its prior precedent and a "casual reading" of the statute "disposes of the attack on those statutes," but added that "[*i*]*n any case, the record discloses that these issues were not presented to the court below, and thus review of them is foreclosed here.*" 428 So.2d at 615 (emphasis added). The *King* case did not involve an application for rehearing. In another case relied upon by the appellant, the Alabama Supreme Court refused to consider new matters on rehearing, and emphasized that its holding was *not* to be understood as having decided the new question. *See Kirkland v. Kirkland*, 281 Ala. 42, 198 So.2d 771 (1967).

Ex parte Hanna, 267 Ala. 527, 103 So.2d 720 (1958), also relied upon by the appellant, did not involve an application for rehearing at all. In *Hanna*, at 267 Ala. 529, the court said:

> "Petitioner also contends that Act No. 375 and Act No. 503 are unconstitutional as being violative of the equal protection guaranty of the Fourteenth Amendment to the Constitution of the United States. Respondent contends that the question is improperly raised. Conceding, without deciding, that the question is properly before us, we are convinced that the argument of the appellant is without merit and requires no further discussion."

There is no indication in the *Hanna* case, which was before the Alabama Supreme Court under its original jurisdiction over petitions for writs of mandamus, as to why the federal constitutional issue might have been improperly raised.

At footnote 5 on pages 11-12 of its Jurisdictional Statement, the appellant cites fourteen additional cases which it claims support its contention that the practice of the Alabama Supreme Court is to "entertain and decide federal constitutional questions for the first time in an Application for Rehearing." Only three of those cases involved constitutional questions. Of those three, only *Dunn v. Dean*, 196 Ala. 486, 71 So. 709 (1916), clearly reflects that the court decided a constitutional issue first raised on rehearing, but that constitutional issue involved the unauthorized enactment of a statute which rendered it void under the state constitution. In *Consolidated Coal Co. v. State*, 236 Ala. 489, 183 So. 650 (1938), the court briefly addressed a federal constitutional issue on rehearing, but did not observe that the issue had not been alluded to on initial submission. The court in *Huie v. Smith*, 236 Ala. 516, 519, 183 So. 661 (1938), noted in its original opinion that "[n]o other question was argued at the bar or in brief," and then addressed a federal constitutional question upon rehearing which was not mentioned in the initial opinion. It is unclear, however, whether the federal constitutional issue was alluded to by the parties upon the original submission of *Huie*.

Of the eleven remaining cases cited by Treadwell in footnote 5 of its Jurisdictional Statement, all involving nonconstitutional issues, one application for rehearing was "stricken," even though the justices decided to "express our views" on the issue raised on rehearing. *See Martin Bldg. Co. v. Imperial Laundry Co.*, 220 Ala. 90, 94, 124 So. 82 (1929). In another (*Federal Land Bank of New Orleans v. Williams*, 237 Ala. 318, 321, 186 So. 689 [1939]), the court addressed an issue while expressing doubt as to whether the question involved could be presented on rehearing, stating:

> "[t]his conclusion is reached without a concession that the question may in this manner be first presented on this application. Of this we entertain some doubt, but need express no opinion thereon."

In *Dodson v. Beaird*, 237 Ala. 587, 187 So.2d 862 (1939), and *Louisville & Nashville Ry. Co. v. Western Union Telegraph Co.*, 195 Ala. 124, 71 So. 118 (1916), the court observed that it would not ordinarily consider new issues raised on rehearing, but did so at the expressed or implied request of the parties.

Goodgame v. Dawson, 242 Ala. 499, 7 So.2d 77 (1942), and *Rudolph v. Rudolph*, 251 Ala. 317, 36 So.2d 902 (1948), were cases in which the court stated that it would not consider issues initially raised on rehearing, but observed, that, even had the new arguments been timely made, they were not well taken.

Bienville Mortgage Corporation v. Mayo, 286 Ala. 675, 245 So.2d 819 (1971), does not support the appellant's contention because it is not at all clear from the decision that the issue addressed on rehearing was not urged upon the original submission.

The four remaining cases relied upon by the appellant are cases where the Alabama Supreme Court admittedly addressed new matters for the first time on rehearing. In *Copeland v. Pope*, 198 Ala. 257, 73 So. 490

(1916), the court had reversed a judgment based solely upon an erroneous charge to the jury. On rehearing for the first time, the appellee drew the court's attention to the fact that the appellant had not reserved a proper exception to the erroneous charge, and the appellate court granted rehearing and affirmed.

In *Gibbons v. Gibbons*, 205 Ala. 636, 88 So. 833 (1921), the appellate court had held that the burden of proof had rested with the respondents below. On rehearing, no new issue was raised, but a new theory was suggested as to why the respondents should not have borne the burden of proof. The court rejected the new theory and overruled the application for rehearing.

In *Sisson v. Swift*, 243 Ala. 289, 9 So.2d 891 (1942), the appellate court's initial opinion recited and relied upon the testimony of one who arguably was incompetent to testify regarding a transaction with a deceased person. On rehearing for the first time, the incompetency was suggested. The Alabama Supreme Court overruled the application for rehearing noting that (1) the challenged evidence was not incompetent and (2) that the remaining evidence was sufficient to justify the initial decision.

Howell v. Roueche, 263 Ala. 83, 81 So.2d 297 (1955), was a case in which the appellate court had held that the trial court had erroneously refused to give the affirmative charge to the jury. Upon the original submission, the appellate court recounted the evidence in detail. On rehearing, for the first time, the appellee asserted that a blackboard diagram used at the trial was not included in the appellate record. In overruling the application for rehearing, the Alabama Supreme Court noted that the diagram was not offered as an exhibit, and that the witnesses had adequately described the facts required for the court to reach a decision.

It is arguably clear from a review of the cases cited by the appellant that, except for the highly unusual judi-

cial disqualification issue referred to by this Court in *Aetna Life Insurance Co. v. Lavoie*, (No. 84-1601, April 22, 1986), the Alabama Supreme Court has not addressed a constitutional issue on rehearing which was clearly not alluded to upon original submission since *Dunn v. Dean*, 196 Ala. 486, 71 So. 709 (1916). Even then, it was addressing the basic question of whether a statute was constitutionally adopted so as to give it life under state constitutional principles.

An analysis of the appellant's cases further reveals that, except for decisions involving § 12-22-72 and in the absence of some compelling reason, the Alabama court has directly addressed new nonconstitutional issues on rehearing in only two of such cases and a new theory in a third case since it decided *Copeland v. Pope*, 198 Ala. 257, 73 So. 490 (1916), some 70 years ago. The most recent of those cases was decided 31 years ago (*Howell v. Roueche*, 263 Ala. 83, 81 So.2d 297 [1955]), and that is the only such case decided in the last 44 years since *Sisson v. Swift*, 243 Ala. 289, 9 So.2d 891 (1942). Aside from those decisions, the cases cited by the appellant reveal that the Alabama court has essentially adhered to its position except in instances where it was uncertain as to whether the issue was properly raised or where the new issue was decided by express or implied consent of the parties. In the other instances, the court refused to consider the new issues, but only discussed the merits of such issues in *dicta*. While it may be claimed that these isolated incidents represent chinks in the walls of perfection, it must be said that the Alabama Supreme Court has protected its rule against considering new issues on rehearing with remarkable consistency.

Even if it is assumed that this Court has jurisdiction of this appeal as to the constitutionality of § 12-22-72, it is clear that it does not have jurisdiction to decide the constitutional issues relating to the excessiveness of the punitive damages awards.

In *Illinois v. Gates*, 462 U.S. 213 (1983), and *Dewey v. Des Moines*, 173 U.S. 193 (1899), this Court made it clear that its review is confined to federal questions which had been properly pressed in the state courts.

Although the appellant attempts to bootstrap its Eighth Amendment and Due Process claims by asserting that it generally challenged the punitive damages awards as excessive in its post-trial motion and upon original submission on appeal, it candidly admits that those constitutional issues were "for the first time, expressly relied on" in its brief upon Application for Rehearing. Jurisdictional Statement, 10-11. Treadwell offers no excuse for not raising those federal issues in the trial court and, as this Court observed in *Exxon Corp. v. Eagerton*, 462 U.S. 176, 181, n. 3 (1983), "[t]he general practice of the Alabama appellate courts is not to consider issues raised for the first time on appeal."

The appellant likewise offers no excuse for not raising the Eighth Amendment and Due Process questions upon the original submission of the appeal to the Alabama Supreme Court.[9] This Court has recognized that the Alabama Supreme Court will not consider matters which are not specifically raised on appeal. *See CIO v. McAdory*, 325 U.S. 472 (1945).

Finally, even when Treadwell did finally raise the Eighth Amendment and Due Process issues for the first time in brief upon Application for Rehearing, its treatment of those issues was woefully inadequate. As is revealed in the excerpts from its brief in support of its Application for Rehearing reproduced at pages 26a-29a of the Jurisdictional Statement, the appellant did not favor the Alabama Supreme Court with the citation of a

---

[9] No claim of "surprise" under the doctrine of *Brinkerhoff-Faris Trust & Savings Co. v. Hill*, 281 U.S. 673 (1930), is suggested.

single authority for the proposition that the awards in this case were unconstitutionally excessive.[10]

Alabama courts have consistently held that they are not required to consider matters in brief for which no supporting authority is cited and which are not sufficiently argued. *See Johnson v. Hodge*, 291 Ala. 142, 279 So.2d 123 (1973); *Bonded Builders & Supply Co. v. Long*, 288 Ala. 669, 264 So.2d 518 (1972); *Morgan v. Cherokee County Bd. of Ed.*, 257 Ala. 201, 58 So.2d 134 (1952); *Mitchell v. State*, 450 So.2d 140 (Ala. Civ. App. 1984); *Blair v. York Engineering Co., Inc.*, 380 So.2d 878 (Ala. Civ. App. 1980); *Security Transactions, Inc. v. Nelson Excavating & Paving Co., Inc.*, 55 Ala. App. 223, 314 So.2d 297, *cert. den.*, 294 Ala. 768, 314 So.2d 304 (1975); *Winn-Dixie Montgomery, Inc. v. Rowell*, 52 Ala. App. 1, 288 So.2d 785, *cert. den.*, 292 Ala. 758, 288 So.2d 792 (1973); *Schwabacher v. Herring*, 35 Ala. App. 496, 48 So.2d 574 (1950).[11]

In its Jurisdictional Statement in this case at pages 16-22, the appellant cites some six cases decided by this Court which it claims, at least by analogy, support its argument that the awards in this case are violative of the Eighth Amendment and the Due Process Clause. Treadwell also refers the Court to arguments in briefs on this issue before this Court in the prior case of *Aetna Life Insurance Co. v. Lavoie* (No. 84-1601, April 22, 1986), which included other citations of authority allegedly supporting the appellant's contentions. Jurisdictional Statement 17. None of these authorities were made available to the Alabama Supreme Court by the appellant in this case.

---

[10] With reference to the other question involved in this appeal, Treadwell cited only *Lindsay v. Normet*, 405 U.S. 56 (1972), and alleged in conclusory fashion that the affirmance penalty was violative of the Equal Protection Clause. *See* Jurisdictional Statement, 30a.

[11] As to the office of briefs upon applications for rehearing, *see DeGraff v. State*, 34 Ala. App. 137, 37 So.2d 130 (1948).

The highest appellate courts of the states of this nation are not "dumping grounds" into which litigants can carelessly toss dispositive federal issues and expect state justices to unravel them on their own initiative. If indeed punitive damages presently being awarded in state courts are running afoul of Eighth Amendment and Due Process Clause proscriptions, those complicated issues cannot be addressed upon bald and unsupported assertions that they do so.

Hathorn v. Lovorn, 457 U.S. 255 (1982), and like cases to the contrary notwithstanding, principles of sound judicial economy and of comity, not to mention plain logic, compel a conclusion that this Court should refrain from reviewing federal issues which are belatedly and half-heartedly addressed to the state courts in violation of the established rules of those courts. This Court has fully and completely recognized this principle several times. In *Webb v. Webb*, 451 U.S. 493, 499 (1981), it said:

> "It is appropriate to emphasize again . . . that there are powerful policy considerations underlying the statutory requirement and our own rule that the federal challenge to a state statute or other official act be presented first to the state courts. These considerations strongly indicate that we should apply this general principle with sufficient rigor to make reasonably certain that we entertain cases from state courts only where the record clearly shows that the federal issue has been properly raised below.
>
> In the first place, although the States are sovereign entities, they are bound along with their officials, including their judges, by the Constitution and the federal statutory law. Principles of comity in our federal system require that the state courts be afforded the opportunity to perform their duty, which includes responding to attacks on state authority based on the federal law, or, if the litigation is wholly private, construing and applying the applicable federal requirements."

CONCLUSION

This Court stated in *Aetna Life Ins. Co. v. Lavoie*, slip op. at 14 (No. 84-1601, April 22, 1986), that the issues raised on this appeal were important issues "which, in an appropriate setting, must be resolved. . . ." It is submitted that the issues were not appropriately raised in this case so as to create the "appropriate setting" required for their resolution.

For the foregoing reasons, the appeal in this case should be dismissed.

Respectfully submitted,

Of Counsel:

RICHARD BOUNDS
JAMES A. YANCE

CUNNINGHAM, BOUNDS,
YANCE, CROWDER & BROWN
1601 Dauphin Street
Mobile, Alabama 36660
Telephone: (205) 471-6191

NEIL L. HANLEY

WHIDDON, HANLEY &
MARIETTA
557 Church Street
Mobile, Alabama 36602
Telephone: (205) 438-6900

ALVIN T. PRESTWOOD *
JOSEPH P. BORG

CAPOUANO, WAMPOLD,
PRESTWOOD & SANSONE, P.A.
350 Adams Avenue
Montgomery, Alabama 36104
Telephone: (205) 264-6401
Attorneys for Appellees

* Counsel of Record

June 6, 1986

APPENDIX

APPENDIX

§ 12-22-72. AFFIRMATION OF STAYED JUDGMENT —GENERALLY.

When a judgment or decree is entered or rendered for money, whether debt or damages, and the same has been stayed on appeal by the execution of bond, with surety, if the appellate court affirms the judgment of the court below, it must also enter judgment against all or any of the obligors on the bond for the amount of the affirmed judgment, 10 percent damages thereon and the costs of the appellate court; and, upon the appeal of any judgment or decree entered or rendered for any amount of commissions, fees or compensation fixed or determined by the trial court and taxed or allowed as costs, if the appellate court affirms the judgment or decree of the court below and the payment thereof has been stayed on such appeal, judgment shall be entered by the appellate court against all or any of the obligors on the bond for the amount affirmed, 10 percent damages thereon and the costs of the appellate court; provided, however, that if no supersedeas bond has been executed on such appeal, the appellate court, in the event of affirmance, shall increase the amount so allowed as costs by the court below in the judgment or decree appealed from by adding thereto 10 percent damages thereon and the costs of the appellate court. (Code 1852, §§ 3032, 3033; Code 1867, §§ 3500, 3501; Code 1876, §§ 3941, 3942; Code 1886, §§ 3661, 3662, Code 1896, § 478; Code 1907, § 2893; Code 1923, § 6153; Code 1940, T. 7, § 814; Acts 1951, No. 724, p. 1275).

ALABAMA RULES OF APPELLATE PROCEDURE

RULE 40.

Applications for rehearing.

The application for rehearing may be made separately or may be included at the beginning of applicant's brief. All applications for rehearing, and the briefs supporting same, must be filed with the clerk of the court within 14 days (2 weeks) after the rendition of the judgment, except that in the case of a pre-trial appeal by the state in a criminal case, any application for rehearing, with the supporting brief, must be filed with the clerk of the court within seven days (one week) after the rendition of the judgment. No party can, as a matter of right, apply for a rehearing unless a brief was filed with the clerk as provided by the rules. No brief opposing the application is required, but a brief from the opposing party may be filed within 14 days (two weeks)—or, in the case of a pre-trial appeal by the state in a criminal case, within seven days (one week)—after the filing of the original application and brief. No second application for rehearing will be considered unless the rehearing reversed or substantially modified the original opinion of the court. (Amended 2-6-84, eff. 4-1-84.)